United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1402

To be argued by
JOEL A. BRENNER
(30 minutes)

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1402

UNITED STATES OF AMERICA,

Appellee,

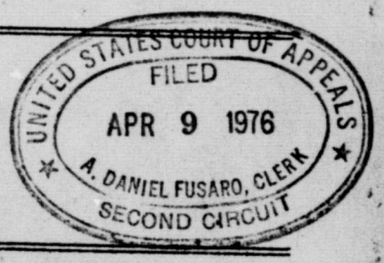
- v -

BARBARA HINTON, et al.,

Appellants.

On Appeal From the United States District Court
For the Eastern District of New York

BRIEF FOR APPELLANT BARBARA HINTON



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QUESTIONS PRESENTED

1. Whether the indictment in this case is void because it was returned by a Grand Jury whose term was unlawfully extended beyond 18 months.

2. Whether the indictment must be dismissed because the prosecutor read appellant's immunized testimony before securing her indictment and because the same Grand Jury which heard appellant's immunized testimony indicted her.

3. Whether the refusal of the lower court to hold a hearing on the issue of use or derivative use of this testimony was reversible error, as was permitting the prosecutor to cross-examine appellant.

4. Whether the refusal of the trial judge to permit defense counsel to develop the issue of bad faith selective prosecution was reversible error.

5. Whether the refusal of the trial court to hold a hearing on the issues of search and seizure and photographic identification was reversible error.

6. Whether there was insufficient non-hearsay evidence to establish appellant's knowing participation in the conspiracy.

7. Whether there was insufficient proof to establish appellant's guilt beyond a reasonable doubt.

8. Whether the trial court's charge on "conscious avoidance" was defective and constitutes reversible error.

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Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Mischler, Ch. J.) entered December 5, 1975 sentencing appellant to two years in prison and three years special parole and a concurrent two year sentence upon her conviction, after a trial by jury, of conspiracy to violate the narcotics laws (21 U.S.C. §846, 963) and unlawful use of a telephone to facilitate this conspiracy (21 U.S.C. §843(b)).

Appellant has been continued on bail pending appeal.

STATEMENT OF FACTS

INTRODUCTION

The prosecution's evidence, if believed, clearly established that Frank Matthews was the head, or one of the heads, of a large scale narcotics distribution conspiracy. General familiarity with this evidence will be presumed, and in this Statement of Facts we shall be concerned only with the testimony offered for and against the proposition that appellant Barbara Hinton knew of and participated in that conspiracy*.

NORMAN LEE COLEMAN** testified that he had been a narcotics dealer since 1964. In 1968 he met Frank Matthews and began working in his organization. Sometime in 1971 one Purcell Wylie, from whom Coleman had received his drugs, said that Frank Matthews had told him that if Wylie could not get in touch with Matthews he should call appellant and she would put Wylie in touch with Matthews' lieutenants who would "serve" him (T. 204).

Sometime he had a conversation with another alleged co-conspirator who said that appellant "was shrewd and could possibly run the operation"

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*Since we are contending that there was neither enough non-hearsay testimony (United States v. Geaney, 417 F.2d 1116 [2d Cir. 1969]) nor enough testimony in total to even take this case to the jury (United States v. Taylor, 464 F.2d 240 [2d Cir. 1973]), the general rule that the evidence must be viewed in the light most favorable to the Government never comes into play.

**It must be recalled that trial counsel objected to the testimony of this witness and every other witness on the ground that it was a product of appellant's immunized grand jury testimony (Point II) and illegally seized photographs (Point II). (T.1050) (All numerical references preceded by "T" are to the trial transcript.

(T. 295)*. He did not know if the person was telling the truth (T. 437-38).

On cross-examination Coleman admitted that Frank Matthews was the "flamboyant" type and was seen in the company of many women other than his wife (T. 324, 331). He said that Matthews had a woman named "Lo" overseeing his Atlantic City operation (T. 329). (He had already admitted that Matthews had an "all-woman" answering service in New York [T. 244])**.

He said Frank Matthews had never mentioned appellant to Coleman nor showed a picture of her to him, and he had never met her (T. 333).

Coleman admitted that he was still on probation and was staying out of jail only with the help of the government; this help included the fact that the government did not report that they knew of his continued drug use (cocaine and heroin) to his probation officer, because such drug use would have violated his probation and returned him to jail (T. 347, 378-79, 428, 439-41, 457). He rationalized the fact that this drug use was a violation of the terms of his probation by stating that he felt he only committed a crime if he "got caught" (T. 357, 382). He agreed that the government would help him stay out of jail only as long as he kept on testifying, and he said that if, during interviews, his memory was not too good, the agents "suggested" things to him (T. 375, 460).

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*An objection that this was merely narrative hearsay was overruled Id. (See Point IV). Coleman later agreed that this information was not given to him to further the conspiracy but was merely "small talk" (T. 336-37).

**A later witness, Donald James, confirmed that all of Matthews' telephones were answered by women, so he was not sure if he was speaking to appellant when he called (T. 1176). See, also, T. 1734-35.

He readily admitted that he would lie under oath to stay out of jail (T. 369, 428).

JAMES WILLIS SMITH gave no evidence against appellant.

He testified that when he and one Lee Roy Cates were arrested for possession of heroin in 1968, Cates called Frank Matthews' girlfriend and Matthews bailed them out (T. 491, 496). He went to stay in an apartment of Matthews' on Prospect Street and Cates stayed at an apartment of Matthews' on President Street (T. 497). The Prospect Street apartment was sometimes used for cutting heroin, a woman named Sondra cut drugs there on several occasions and Matthews once had her bring out a bag full of money from another room to give to a drug dealer (T. 504, 510, 553-54).

By contrast appellant was only at the Prospect Street apartment once, and that was when she and her son Sean came with another woman for dinner (T. 508, 517, 552)*. Appellant lived at the President Street apartment with her children and, on his infrequent visits, Frank Matthews (T. 518, 546).

Smith agreed on cross-examination that Matthews always distinguished between appellant and his other women and neither Matthews nor anyone else that Smith met (including Matthews' "business" associates) ever said a word connecting appellant to Matthews' drug business. Additionally, Smith never saw appellant possess or even be in the same apartment with any drugs, and

*Appellant had gone to this apartment with her son and another woman because Matthews was so protective of her that he became furious at her if she was ever alone with another man (T. 802).

she never discussed drugs or Matthews' dru business. Matthews was the "boss" of their family and she was just a "quiet person" (T. 559).

THOMAS LEE MOREHEAD also gave no evidence against appellant.

He testified that after he escaped from prison he had become involved in using and selling heroin and had worked for Frank Matthews. In 1969 he worked with Gattis ("Bud") Hinton* and other girls bagging heroin at the Prospect Street apartment (T. 688-89, 745)**.

He only saw appellant at her President Street apartment (T. 711). He never heard Frank Matthews or any of Matthews' associates mention that appellant was involved with drugs. He said that he knew many men involved in drugs who "used girlfriends for certain such work and keep their wives completely separate and distinct and don't allow their wives or their family in any way to get involved in narcotics" (T. 799-800).

WILLIAM FRED CAMERON testified that he began buying drugs from Frank Matthews in 1971 (T. 1006).

On one occasion Matthews said that if Cameron could not get in touch with him he should call Marzella Webb in Durham, North Carolina. After he called this number on two occasions Matthews got in touch with him a few hours later (T. 1007-1009).

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*No relation to appellant (T. 796)

**He was also present at bagging in an apartment on President Street called the Ponderosa. This was not appellant's ap rtment and he never saw her there (T. 834, 979-80).

He only saw appellant once in New York. On this occasion she picked him up and drove him to the President Street apartment*. She stayed in another room with her children while he and Matthews talked. Before they left Matthews called her in, gave her a bag, and told her to "check it". She took the bag and left and Cameron did not see her again (T. 995, 1009-1016)**.

When he was directed to pick up heroin during a subsequent deal it was by a "tall bright-skinned" woman, not appellant (T. 1040).

On cross-examination he admitted that the first time he ever made any statements about the "Frank Matthews matter" was after agents or an Assistant United States Attorney threatened him with a "life sentence", then agreed to help him if he co-operated (T. 1060-61).

On redirect, over objection that it was improper, because appellant's counsel had conducted no cross-examination, Cameron contradicted his direct testimony and said that before he and Matthews had left the President Street apartment appellant had returned to the room and said "O.K." (T. 1076-78).

On recross the witness denied that he had told an agent*** that he had given the bag directly to appellant and never saw Matthews (T. 1082).

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*He had to identify himself to her as "Babe" because she did not know him (T. 1011).

**The bag contained $12-$14,000 for a proposed drug purchase but there was no evidence appellant actually ever saw or counted the money or knew of its purpose (T. 1014-16).

***See 3500-42.

DONALD JAMES gave some testimony inferentially inculpating appellant*.

He admitted numerous past crimes, to having received over $14,000 in government assistance and to promises of the government to help in regard to his sentences and not prosecute him for any drug crimes from 1970-1973, so long as he testified in a "certain way" because, otherwise, "all bets were off" (T. 1125-41, 1230, 1308).

In 1970 he had his own drug ring employing 100-150 people and he began receiving drugs from Frank Matthews (T. 1153).

On three of the numerous occasions he said he brought money to Matthews' apartment (130 Clarkson Avenue) in payment for drugs appellant was in the apartment. However, only on one of these occasions was she in the room where he counted the money and on none of these occasions were drugs discussed or was it said that the money was for drugs; the witness agreed that "For all she knew, at the time you brought the money it could have been for a gambling debt" (T. 1163-71, 1262)**. Furthermore, although one of

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*All his testimony and his identifying of appellant was objected to on grounds of use immunity violation and improperly suggestive identification (T. 1107-24) (See Point II).

**Frank Matthews was known to many of the witnesses and to the government as a "big gambler" (See, e.g. T. 801-802, 1263, 1533, 1592, 2354, 3575, 3929, 4355).

In fact, when he was indicted it was as "Frank Matthews a/k/a... Big Book", i.e. Big Bookmaker.

Appellant herself testified that Matthews was a big gambler and that people often came to him to pay off gambling debts (See, e.g., T. 4857).

One of Donald James' partners, Richard Thrasher, was involved in both drugs and gambling at the same time (T. 1297).

the payments was allegedly given directly to appellant because Matthews was not home (T. 1165-69), and the witness said he would have entered appellant's name on the payment books he kept (T. 1272), there was absolutely no reference to this incident in any of the 17 books that had been seized from him (T. 1264-74)*. The witness admitted that the only proof that he gave a payment to appellant "is your word" (T. 1275)**.

James also condeded that although his female drug partner or his wife had been with him at numerous drug deliveries, appellant had never been present. Similarly, although numerous women were present at bagging operations with Matthews, appellant was never at any of these places. Lastly, he never discussed drugs with appellant at any time or heard anyone ever mention her name in connection with any drugs (T. 1254-55, 1288).

DETECTIVE JOSEPH KOWALSKI testified that he lived at 130 Clarkson Avenue during the period 1969-1972 when Frank Matthews and appellant lived there (T. 1476). He maintained surveillance of appellant only because he did so for anyone that had anything to do with Matthews (T. 1521). During all the

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*Detective Joseph Kowalski, who surveilled this apartment for the Joint Task Force during the period of James' alleged visits said he did not recognize a picture of James and did not know his name (T. 1545-48, 1624-25).

**The witness whose "word" was at issue admitted using drug addicts in shooting galleries to test the strength of his drug mixtures before he marketed them; if it was too strong he could then cut it before distribution. Unfortunately, the addict-guinea pig would also die (T. 1299-1300).

time he watched her he only saw her doing "normal housewife" and mother things; he never saw her in possession of drugs or large amounts of money nor did he ever overhear her engaged in any conversations which could be interpreted as involving drugs (T. 1529-31).

DICKIE DIAMOND gave no testimony inculpating appellant. He merely said he had seen her out socially with Frank Matthews, William Beckwith and a group of other women (T. 1880-82)*.

On cross he reluctantly admitted seeing Matthews with many women other than appellant, among other places at Diamond's apartment; Matthews was a "bona fide [girl] freak" (T. 1948-49). He said the telephone number Matthews gave him to reach Matthews in New York was a Bronx number (T. 1954)**.

Neither he nor any of his "people" ever met or spoke with appellant; he never saw her handle any drugs or money; he never saw or heard her do anything related to drugs; she was merely a "respectful young lady, Mrs. Matthews" (T. 1955-56).

GEORGE RAMOS also gave no testimony inculpating appellant.

He testified that on several occasions between 1970 and 1972 he brought cocaine from Bolivia and delivered it to Frank Matthews (T. 2292-2310).

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*One Woman, named Loretta, may have been the "Lo" that Norman Lee Coleman said was running Matthews Atlantic City operation (T. 329).

**This was the number at 3333 Henry Hudson Parkway, which appellant never entered (T. 5104-05).

On one occasion in late June 1972 he accompanied Matthews to 130 Clarkson Avenue. As Matthews opened the door of an apartment he said "Barbara, Barbara". There was no answer and "Barbara" was not there. On a table in one of the rooms was a quarter kilogram of cocaine, from which Ramos took an ounce. (T. 2311-12).

They then drove to Matthews' new house on Staten Island and as they were leaving, after looking through the house, appellant arrived (T. 2312-13). He was not introduced to appellant and did not speak with her (T. 2323).

During their drug dealings Matthews gave him the number at 3333 Henry Hudson Parkway, a North Carolina number and an Atlanta number in order to be able to reach him, but never gave him the Clarkson Avenue number (.T. 2316, 2326). Matthews never told Ramos to contact appellant in order to reach him and never discussed appellant in connection with narcotics (T. 2324).

On cross-examination Ramos admitted that nowhere in his extensive debriefing or in his lengthy grand jury testimony did he ever mention the visit to Clarkson Avenue with Matthews (T. 2328-30).

REESE WHITING gave no testimony implicating appellant.

He stated that he had made numerous drug purchases from Frank Matthews' organization in 1972 (T. 2353). During these transactions he never heard of, or saw, appellant and he was not given her phone number as a means of contacting Matthews (T. 2368).

NORMAN HARRIS gave no testimony inculpating appellant, merely stating that he was introduced to her and hew two children on one occasion (T. 2422-23).

WALTER ROSENBAUM gave no testimony about appellant at all (T. 2496-2854). The same was true of FRANCIS MALONEY, BENNIE SWINT, WILLIAM HAUSMAN and CHARLES BRONO (T. 2854-3042).

WILLIAM RAYWALD testified that on January 31, 1972 he saw appellant exit from 130 Clarkson Avenue with Frank Matthews and several others and saw appellant walk away from this group (T. 3100-02). On cross-examination Raywald said that during well over 100 hours of surveillance he never saw appellant do anything "suspicious"; she merely acted like an "ordinary housewife" (T. 3137-40). (See, also, testimony of ERNEST MAHONE at T. 3790, 3853-55).

RICHARD COMPTON, ROBERT RICHEL, and VINCENT DeSTEFANO gave no testimony concerning appellant (T. 3221-3301).

ROGER GARAY testified to seeing appellant at her home on Staten Island and in front of her apartment on Ocean Parkway (after Frank Matthews fled). On none of these occasions did he ever see appellant with drugs or any "suspicious" packages and he never heard her talk about drugs (T. 3360-69, 3375, 3389-93, 3432-35).

He also testified to allegedly drug-related activities at 130 Clarkson Avenue, but admitted appellant was not present and had already moved to

Staten Island (T. 3490). He testified to a raid on a drug mill at 101 E. 46th Street and agreed, again, that appellant had never been there (T. 3490).*

On cross-examination he stated that Frank Matthews was a "night person", frequently returning to Clarkson Avenue between 4:00 and 8:00 a.m. He said that Matthews had two girlfriends living with him in his Fort Lee apartment, that he had a girlfriend (Sondra) at a different Clarkson Avenue address and that he had been seen entering other apartments with other women. He admitted that Cheryl Brown disappeared within a week of Matthews (T. 3311, 3325, 3471-74, 3384, 3386).

He agreed that a policeman conducting a surveillance based on a photograph of appellant might mistake Lorraine Connor for her, especially since they lived in the same apartment house (and, once, in the same apartment), spent a great deal of time together, and their children played with each other (T. 3475-76, 3480)**.

JOHN DWORSAK testified that in over 500 hours of surveillance of 130 Clarkson Avenue he never saw appellant with drugs or large amounts of money (T. 3657-59).

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*Detective Ernest Mahone testified that a book found during this raid contained references to narcotics transactions. Appellant's name was not present (T. 3853

**Garay testified that although several thousand hours had been put into building a case against Matthews, he was not upset that Matthews could not be found (T. 3494-95). He did admit asking appellant where Matthews was and telling her about the $20,000 reward (T. 3492). Based on this and other testimony indicating that appellant had been indicted to punish her for not telling where Matthews was, trial counsel requested a selective prosecution hearing. The request was denied (T. 5025-26).

He also said he never saw Donald James enter that building (T. 3660)*.

DETECTIVE GARAY was recalled to testify about various taped conversations of appellant and others**.

Of the 450 hours of recorded conversations the prosecution presented what the witness called the seven "most obvious" drug-related conversations (T. 4372, 4388).

The first conversation (No. 6) was from Frank Matthews to appellant on July 8, 1972. The allegedly incriminating portion dealt with Matthews saying that he had to leave a "package" in an airport locker, and Garay opining that the "package" was narcotics (T. 4225-32)***. On cross-examination it was pointed out that Matthews had said he had to fly back to pick up the package, which meant it was money he had intended to take down to South America and not drugs (T. 4355-60)****. Furthermore, although Garay interpreted the

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*James had testified to delivering drug money to Matthews and, on one occasion, appellant in that building (T. 1165-69). James' own records showed no reference to this event (T. 1264-74) and Detective Kowalski, who conducted extensive surveillance of this building, did not recall ever seeing James (T. 1545-48, 1624-25). Dworsak's testimony further undercut James' story.

**The tapes were objected to on grounds of failure to minimize and narrative hearsay. Pursuant to Federal Rules of Appellate Procedure 28(i) appellant has adopted Point III of co-appellant John Darby's brief on the minimization issue. The narrative hearsay issue will be treated in Point IV, supra, of this brief.

***The full statement was:

> "You know, you know that package I had--
> I couldn't go on the plane with it, so I had
> to leave it in a locker and I had to fly back
> today to get it."

****Garay admitted that he was wrong when he said Matthews made two flights to South America in two days (T. 4479).

term "thing" to mean drugs, he admitted that in this conversation it meant a fee to a real estate attorney (T. 4347, 4361)*.

The second conversation (No. 19) was from appellant to Gattis Hinton. The following was said to be a "guarded conversation (T. 4316):

> "Have you seen my friend?...Well, if you know how to reach him...tell him that... what he wanted was bought and to give me a call, because...he made it for a different time".

On cross-examination Garay admitted that it was a wholly innocent call dealing with shares of stock (T. 4364)**. (This, too, was confirmed by appellant's testimony (T. 5074).

The third call (No. 20) was from John Darby to appellant and Frank Matthews on September 1, 1972***. In it, Darby made reference to a "tomato crew". Garay said the term "crew" meant the mill workers, and that was what "tomato crew" meant (T. 4317).

On cross-examination, he admitted that he had never heard the word "tomato" used as a drug term of art, but insisted it "could be". He did agree that appellant appeared not to know the meaning of the term and had to ask

*When appellant testified she confirmed that the "package" was money Matthews was taking to South America in connection with a land purchase (T. 4942, 4944- and the "thing" was a fee to Thaddeus Owens, Esq., a Brooklyn real estate attorney in connection with the purchase of property in the South (T. 4860-61).

**To force this concession defense counsel introduced what Garay called a "highly suspicious" conversation between appellant and John Darby concerning putting up money for "shares". Garay then recalled finding out that the "shares were of stock, as with the call to Gattis Hinton (T. 4385a-88).

***This call was the basis of count 4, on which appellant was found guilty.

Matthews what to respond.* He also agreed that much of appellant's part of this conversation consisted of repeatedly muttering "Uh huh, yes", because she wanted to get off the phone and get medicine for the sick Matthews (T. 4362, 4371).**

The fourth call (No. 21) originated with appellant and Dolores Beckwith and ended with Matthews and William Beckwith. There was nothing incriminating while appellant spoke (T. 4372-74).

The fifth and sixth calls (No. 27 and No. 28) were between Thelma Darby and appellant on September 16 and were about John Darby's arrest and the seizure of money. Garay conceded that the bulk of the conversation came from Mrs. Darby and that appellant merely went "Uh huh" (T. 4329-30, 4338-39, 4375, 4377). (See also T. 5082-93). In any event, since the jury acquitted

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*"Darby: I gotta...this tomato crew.
Appellant: (clearing throat)
Darby: (cont'g.)...tomato crew.
Appellant: Hm?
Darby: I got the tomato crew.
Appellant: The tomato crew?
Darby: Huh?
Appellant: Yeah. What'd you say?
Darby: ...Do you know the ones that always go out in the truck and pick the tomatoes?
Appellant: Uh-huh. So, what do you want me to do?
Darby: I'm sorry he feel sick though I don't know whether to keep them here or not.
Appellant: Hold on a minute (pause).
Appellant: Uh, he say be cool until he talk to you."

**Appellant testified she did not know what "tomato crew" meant or why Darby was talking about it ("I wouldn't have related it to Frank if I knew"), and she still did not know what it meant (T. 5076-77).

appellant and Mrs. Darby on Count 9 (which was based on these calls), they clearly found them to be innocent and not in furtherance of the conspiracy.

The last call (No. 30) was from Lorraine Connor to appellant on September 2. Although Garay had said "thing" meant drugs he conceded that "baby things" meant clothes (T. 4385). Although appellant told Connor not to use the figure $50,000 on the phone because appellant thought it was tapped (T. 5093), it was shown that the figure represented money John Darby owed Matthews for bail, not for drugs (T. 4383, 5411).

The foregoing constitutes the essence of the prosecution case against appellant* and a motion to acquit was denied (T. 4613).

CASE FOR THE DEFENSE

ELEANOR RISPHAM and WILLIAM STEPHENS both testified that they had known appellant for many years, that they had never seen her with drugs or large sums of money or heard her speak of either**, and that she had a reputat

*A government agent also testified that he observed appellant leaving the Crillo Motel in Atlantic City on September 6, 1973 with John Darby and James Martine (T. 3943). The agent did admit that appellant resembled Lorraine Connor, and Crillon registration cards showed that appellant had checked out on August 14 while Connor left on an unknown later date (T. 3953, 5039-40). Appellant testified she was at this motel for a few days in August, but not on September 6 (T. 4915). Two bail bondsmen also testified that appellant was involved in securing bail for her common-law husband (though she was not a surety) and in indemnifying the company when he fled. Both witnesses said it was both legal and natural for a wife to aid a husband in this way (T. 3760-70, 4048- 408 Lastly, there were stipulations that appellant purchased several cars with cash that she paid for some interior decorating in cash, that certain cars were registered in her name, that certain premises were leased in her name and that certain telephone numbers were listed to her (T. 4530-37). (Appellant later testified Matthews gave her the money for these things [T. 5097-5110]).

**Stephens, in fact, loaned appellant's mother $5,000 to buy the house she and appellant now live in (T. 4789).

for truthfulness (T. 4769-90).

BARBARA HINTON denied that she ever had knowledge of or participated in any drug conspiracy (T. 4792-96).

She testified she knew Frank Matthews since 1966 and had a son by him but never married him because he always broke his promise to do so (T. 4823-25).

When she met him he was a gambler (booking numbers in a barber shop) and he had been arrested for gambling*; as the years went by his income increased dramatically (T. 4826-27)**. He was often loud and abusive to her, both striking and cursing her (although always in private). (T. 4829, 4833). He was often gone for weeks at a time and she knew he had other apartments and other women (including a child by one Sondra); in fact, on occasion, she was mistaken for one of his girlfriends ("I was told that I was at certain places when I know I wasn't there") (T. 4832, 4848, 4869-72). When he was arrested in Las Vegas he was with Cheryl Brown (T. 4878). He was extremely domineering, never allowing her to be present at any of his "business" meetings, never allowing her in bars***, not permitting her to let anyone he did not know into the apartment (T. 4862-63, 4878):

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*This is where he got the nickname "Big Book" from (T. 4842).

** Their joint income tax returns for the years 1970-1972 showed gross income of $55,000, $173,000 and $1,200,000, respectively (T. 5001-09).

***For this reason she knew she had never been in Brownie's or the Cove, two of the bars Matthews and his associates frequented (T. 4862-63).

"Gossip, my whole life is considered gossip. I wasn't allowed to do anything; talk on the phone, go shopping, all I looked forward to was hearing gossip". (T. 4905)

She never used drugs and never saw any drugs or drug cutting implements at 130 Clarkson Avenue (T. 4836). (She moved out of that address in April 1972 and did not return until October 1972 when Matthews told her to have some furniture removed. Matthews would have had no reason to say "Barbara, Barbara?" when he allegedly took George Ramos to that address in June 1972 and there was cocaine on a table [T. 4868, 4873]). She had heard that Matthews used cocaine but never saw him use it or any other drug (T. 4874-75).

She never saw any bags of money in the bedroom closet. She said tha Matthews used a hall closet which he kept locked (T. 4836, 4841, 4900-01).

She signed their joint income tax return because he told her to, signe leases because he told her to, paid bills with money he gave her or had put in checking account and, in general, did what she was told to do* (e.g., Matthew worked out the manner in which his bail was to be raised and she merely relay what he said to the bail bondsmen [T. 4923]) (T. 4858, 4871).

She said that Matthews gave her $25,000 two to three weeks before he disappeared (June 1973), that the money was now spent, and that she was work and living with her family who were helping to support her (T. 5110-13, 5117).

*Matthews gave her the cash for the purchase of a succession of cars (T. 509 5103).

Although she had heard that Matthews was under investigation for drugs, he always denied being involved in narcotics and she never knew if it was true. She was never involved in narcotics in any way (T. 5093, 5095, 5116-17).

On cross-examination she said she had driven "Babe" Cameron to Clarkson Avenue because he had a limp. She never received a bag from Matthews while Cameron was in the apartment (T. 5153-54).

She said that all the times John Wesley Carter called the apartment it was to speak with Matthews, not her (T. 5210). The same was true of John Darby, "Bud" Hinton, or others that called; she merely took messages (T. 5280-85). She said "If they called me it was the last resort to find Frank" (T. 5354). On one or two occasions she was left money for Matthews, and assumed it was gambling proceeds (T. 5285-89).

Appellant then rested (T. 5446).

VERDICT

Appellant was found guilty on the conspiracy court (Count 1) and on one "telephone" count (Count 4--"tomato crew") and was acquitted on the other telephone count (Count 9--calls with Thelma Darby) (T. 7411-13).

SENTENCE

On December 5, 1975 appellant was sentenced to two concurrent two year terms to be followed by three years special parole.

She was continued on bail pending appeal.

POINT I

THE INDICTMENT IN THIS CASE IS VOID BECAUSE IT WAS RETURNED BY A GRAND JURY WHOSE TERM WAS UNLAWFULLY EXTENDED BEYOND 18 MONTHS.

The Grand Jury which returned the indictment upon which appellant was convicted was convened in June 1972 and returned the instant indictment in January 1975, i.e., some 31 months later. (T. 4615; Docket Sheet for 75 Cr. 72 at 1). Under Rule 6(g) of the Federal Rules of Criminal Procedure and the Court's decision in United States v. Fein, 504 F.2d 1170 (2d Cir. 1974) the Grand Jury was without power to return a valid indictment after 18 months had elapsed from June 1972 and this indictment is therefore void.

Under Rule 6(g) "no grand jury may serve more than 18 months". Since the grand jury here was sitting 31 months when it voted 75 Cr. 72, the indictment was returned in violation of Rule 6(g). In United States v. Fein, supra, this Court held "that the Congress, by imposing restrictions on the life of the grand jury, clearly indicated that indictments filed thereafter are void" (Id. at 1178)*. Since the "jurisdiction" of the grand jury is being

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*The only exceptions to the 18 month rule are special grand juries convened under 18 U.S.C. §3331 and there is no indication in the record that this is such a grand jury. The special grand juries are traditionally used by the Strike Forces to investigate crimes that local grand juries are considered incapable of handling. Assistant United States Attorney DePetris, who presente this case to the grand jury, is not a special attorney or strike force attorney. Furthermore, if the Strike Force used a §3331 grand jury to investigate and indict for common narcotics crimes it would violate the intent of §3331. See In re Persico, 522 F.2d 41 (2d Cir. 1975).

challenged, the failure of counsel to make a motion to dismiss before the trial court is not a waiver of the objection (United States v. Fein, 370 F.Supp. 466, 469 (E.D.N.Y.), aff'd. 504 F.2d 1170 [2d Cir. 1974]) and the issue may be raised for the first time on appeal. See, e.g., United States v. Guyette, 382 F.Supp. 1266 (D.C. Va., 1974). Accordingly, the indictment must be dismissed.

POINT II

THE INDICTMENT MUST BE DISMISSED BECAUSE THE PROSECUTOR READ APPELLANT'S IMMUNIZED TESTIMONY BEFORE SECURING HER INDICTMENT AND BECAUSE THE SAME GRAND JURY WHICH HEARD APPELLANT'S IMMUNIZED TESTIMONY INDICTED HER. ALTERNATIVELY, THE REFUSAL OF THE LOWER COURT TO HOLD A HEARING ON THE ISSUE OF USE OR DERIVATIVE USE OF THIS TESTIMONY WAS REVERSIBLE ERROR, AS WAS PERMITTING THE PROSECUTOR TO CROSS-EXAMINE APPELLANT.

(a) Dismissal of the indictment is required as a matter of law and in the the exercise of this Court's supervisory powers.

On November 21, 1972 appellant appeared before the grand jury for the first time. After 20 pages of testimony, during which she claimed her privilege against self-incrimination as to questions not dealing with her "pedigree", she was excused*.

*Copies of the minutes of all of appellant's grand jury appearances have been made available to the Court.

On February 16, 1973 Judge Rosling singed an order granting appellant immunity, and she was recalled on February 20, 1973. She persisted in claiming her privilege and after 8 pages she was excused, apparently so that the prosecutor and her attorney could discuss the immunity issue.

She was recalled the following day and gave 116 pages of testimony concerning her knowledge of, and participation in, the narcotics dealings of her common-law husband Frank Matthews. She re-appeared on March 7, 1973 and gave 80 more pages of testimony on the same subject.

In toto, therefore, she appeared four times and gave over 200 pages of testimony before the same grand jury which indicted her. This constitutes a violation both of her privilege against self-incrimination and her right to due process of law. Accordingly, both as a matter of law and in the exercise of this Court's supervisory power, this indictment must be dismissed.

Any discussion of the issues posed by the above facts must start with the following assertion of then Chief Judge Friendly in United States v. Goldberg, 472 F 2d 513, 516 (2d Cir. 1973):

> "We would be greatly troubled by what has happened here if the Government were seeking an indictment of Goldberg from the grand jury before which he is being asked to testify. Although the order to compel testimony might be valid, we would have most serious doubt about the validity of such an indictment. Despite any instructions from the judge, it would be well nigh impossible for the grand jurors to put Goldberg's

> answers out of their minds, cf. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968), and testimony compelled by the order would thus 'be used against the witness in [a] criminal case,' cf. Kirby v. Illinois, 406 U.S. 682, 688-689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), in defiance not only of 18 U.S.C. § 6002 but of the command of Kastigar that the immunity must be 'coextensive with the scope of the privilege.' 406 U.S. at 449, 92 S.Ct. at 1664. But the Government represented to us in open court that the grand jury before which Goldberg has been directed to answer questions will not be asked to indict him." (emphasis added)

It is the contention of appellant that the foregoing quotation also ends discussion of the validity of this indictment*.

Appellant contends that the Goldberg case sets forth a per se rule, to wit, the grand jury that hears a witnesses' immunized testimony may not indict that individual for the crimes about which the testimony was compelled**. Only a per se rule will ensure that immunity will be "coextensive with the scope of [Fifth Amendment] privilege". Kastigar v. United States, 406 U.S. 441,

*It has been suggested, in dictum, that Goldberg has been overruled by United States v. Calandra, 414 U.S. 338 (1974). United States v. Dornau, 491 F.2d 473, 481 n. 15 (2d Cir. 1974). This suggestion is based on the dictum in Calandra, at 345, that "An indictment valid on its face is not subject to challenge...even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination". There are several reasons that the suggestion should be disregarded. Firstly, the quoted dictum from Calandra cites Lawn v. United States, 355 U.S. 339 (1958). The panel that wrote Goldberg, however, was aware of Lawn (see 472 F.2d at 516, n. 4) and felt that Lawn had not settled the question. See also Jones v. United States, 342 F.2d 863, 868 (D.C. Cir. 1964) (also cited in Goldberg at n. 4). Secondly, Lawn involved successive grand juries and the defendants did not testify before the second one which indicted them. Thirdly, Lawn did not have any of the hallmarks of a deliberate violation of a grand jury witnesses' rights that this case has. Accordingly, even if dismissal is not required by law, it should be done in the exercise of this Court's supervisory powers. See, infra.

**An indictment for perjury may, of course, be returned by the grand jury which heard the alleged perjurious testimony. United States v. Tramunti, 500 F.2d 1334 (2d Cir. 1974).

449 (1972). Only a per se rule will relieve the lower courts of the burden of attempting the impossible task of determining if the immunized testimony infected the indictment or the resulting prosecution.

What happened below in this case illustrates the pitfalls into which a trial court must plunge if anything other than a per se rule is used.

Judge Mischler denied the motion to dismiss because he found that there was "independent" evidence to indict appellant. Apart from the adequacy of this "finding", particularly in the absence of any hearing (see (b), infra), it is respectfully submitted that it missed the real issue in two essential respects.

Firstly, the court should not have substituted its judgment that there was independent evidence for that of the grand jury. In other words, there is no way of knowing whether the grand jury, had the issue been posed to it, would have decided there was sufficient "independent" evidence and returned an indictment*. In Ex Parte Bain, 121 U.S. 1 (1887) the Supreme Court held that it was

*The facts, if anything, point away from such a result. The grand jury had hear the testimony of Robert Lee (January 23, 1973) that appellant "ran the operation" when Frank Matthews was not present (pp. 12-13, 15-16, 22) but they did not indic her when they indicted Matthews and others in 73 Cr. 100. Furthermore, the thinness of the evidence adduced against her at trial indicates that but for her appearance before the grand jury she would not have been indicted (See Points III infra). In this context it must be noted that the prosecutor clearly indicated to the grand jury his disbelief of her testimony (Minutes of 2/21/73 at 46-47; Mins. 3/7/73 at 21-22, 36, 53-54, and the questioning of some of the grand jurors indicated that they shared this disbelief (Mins. 2/21/73 at 101-103; Mins. 3/7/73 at 58-80, esp. 72 "Juror: You realize that I'm testing your credibility...It's going to be our job, my job to decide whether I believe you or not. ...Do you wish to change any of your testimony"). This illustrates another danger of the same grand jury indicting a witness it has heard, to wit, the indictment may be a way of striking back at a witness who is thought to be uncooperative or evasive though not perjurious.

improper for a trial court to strike portions of an indictment because that deprived the defendant of his right to be tried on the indictment voted by the grand jury which indicted him. The language of the Supreme Court in that case renders invalid the asserted finding of the lower court here:

> "How can the court say that there may not have been more than one of the jurors who found this indictment, who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held, to answer,' may be frittered away until its value is almost destroyed." (Id. at 10)

Secondly, the question is not whether "independent" evidence existed, but whether the grand jury used appellant's immunized testimony in deciding whether to indict. In other words, the fact that there may have been independent evidence does not mean that the uninstructed grand jury made no use of the more than 200 pages of testimony appellant gave*.

In addition to the impossibility of determining whether the grand jury used appellant's testimony against her, must be added the impossibility of

*It was argued that the grand jury had not been instructed not to use appellant's immunized testimony, the prosecutor made no statement to the contrary and the lower court said it assumed no such instruction had been given. (T. 273).

determining whether the prosecutors, who read her testimony before presenting other witnesses to the grand jury, violated her protection against derivative use of her testimony (see (c), infra). In United States v. Dornau, 359 F. Supp. 684 (S.D.N.Y., 1973), rev'd. on other grds., 491 F.2d 473 (2d Cir. 1974) (but cf. ftnt. 15 at p. 481), Judge Metzner dealt with a situation where a prosecutor had read an individual's immunized testimony from another jurisdiction before interrogating witnesses before the grand jury which indicted the individual. In dismissing the counts of the indictment which related to the immunized testimony he made observations which are highly pertinent here:

> "We have here one of the problems presented by the opinion in Kastigar. How do you make sure that a person who has testified under a grant of immunity will be protected against subsequent criminal charges to the same extent as if he had originally pleaded the Fifth Amendment? This is a matter of great concern and debate. See Note, Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli, 82 Yale L.J. 171 (1972) and The Supreme Court, 1971 Term, 86 Harv. L. Rev. 1, 181 (1972). It is difficult for the court to speculate as to the effect that the reading of the minutes might have had on the conduct and thinking processes of the Assistant charged with the prosecution of the case.
>
> It appears to me that once the subject matter was touched upon in the privileged testimony, and the prosecutor has read it, he could have used it in a variety of ways in this criminal prosecution. The possibility of such use, and the impossibility of clearly showing that the use did not occur calls for the holding in this case that the defendants were denied the constitutional protection that their silence would have given them. Murphy v. Waterfront Commission, 378 U.S. 52, 79, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964). The breadth of this ruling is justified by the language in Kastigar that

the immunized testimony could not be used 'in any respect.'

Support for the conclusion reached here may be found in United States v. McDaniel, 449 F.2d 832 (8th Cir. 1971), cert. denied, 405 U.S. 992, 92 S.Ct. 1264, 31 L.Ed.2d 460 (1972). That case relied on Murphy v. Waterfront Commission, supra. Both of the cases were concerned with interjurisdictional immunity. However, Kastigar explicitly adopted the same rule of privilege where only one sovereign is concerned. In McDaniel, the court said 449 F.2d at 837:

> 'The circumstances of this case, however, are not ordinary, for we are faced with the fact that the United States District Attorney requested and received a transcript of the compelled state testimony. We conclude that this conduct violated the defendant's Fifth Amendment rights and constitutes a prima facie 'use' of the testimony which is prohibited by the Murphy exclusionary rule.'

The question of whether the remedy for this violation of defendants' constitutional rights should be by way of suppression of evidence or by dismissal was determined by me in favor of the latter course in the prior opinion which initiated these proceedings. 356 F.Supp. 1091, supra. After the hearing and the clarification of the fact issues involved, my original views have been confirmed that in this case dismissal is the only proper remedy. It is impossible to suppress specific evidence in the light of the problem involved." Id. at 687.

In this context it should be noted that Mr. Justice White's concurring opinion in Murphy v. Waterfront Commission, 378 U.S. 52, 93 (1964) states that the holding of the majority is that use immunity "forbid[s]...federal officials access to statements made in exchange for a grant of...immunity." In United

States v. McDaniel, 449 F.2d 832 (8th Cir. 1972), on remand, 352 F.Supp. 585 (D.N. Dak., 1972), aff'd. 482 F.2d 305 (8th Cir. 1973), the court held that "the Federal Government can obtain access to...[immunized] testimony only at the cost of foregoing prosecution as to those matters to which the testimony relates". Id at 839-840.

A reading of appellant's grand jury testimony of February 21 and March 7, 1973 makes it crystal clear that she was indicted for matters "related to" her testimony. See United States v. McDaniel, supra, 352 F.Supp. at 588. She was told that the grand jury was investigating "narcotics violations in the Eastern District of New York" and she gave extensive testimony on precisely that matter. Accordingly, the indictment must be dismissed as a matter of law.

In addition, appellant submits that this indictment must be dismissed in the exercise of the Court's supervisory powers. Cf. United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972). To permit the prosecution to compel hundreds of pages of testimony from a grand jury witness under a grant of immunity and then to permit the same prosecution to read that testimony and use it in preparing and presenting other witnesses to the grand jury, and then to permit the same grand jury, without even being instructed not to use the immunized testimon to indict the immunized witness is "so 'offensive to the common and fundamental ideas of fairness' as to amount to a denial of due process". United States v. Mandujano, 496 F.2d 1050, 1059 (5th Cir. 1974), cert. granted, 420 U.S. 989

(1975), quoted in United States v. Jacobs, _____F.2d_____, slip. op. 2111, 2114-2115 (2d Cir., dec'd. 2/24/76). It is both an abuse of immunity-granting power of the Federal Government and of the grand jury procedure. It is fraught with potential for mis-use by even well-intentional prosecutors and with potential for the visitation of manifest injustice upon grand jury witnesses and defendants. This Court must call a halt to this practice immediately.

(b) Refusal of the lower court to hold a hearing is reversible error.

Assuming, without conceding, that the above arguments do not require a dismissal under a per se rule or in the exercise of this Court's supervisory power, the refusal of the lower court to conduct a hearing on the "independent evidence" issue was reversible error.

Appellant's trial counsel moved several times for dismissal of the indictment or, in the alternative, for a hearing on this issue (T. 187-203, 783, 1050, 4613). At first, the court refused to hold a hearing (T. 198) but later stated "If the defendant is convicted I will give you a full hearing" (T. 1050). However, when counsel again moved for a hearing after the government had rested, the court said it had ruled against appellant's position and would not grant a hearing (T. 4613-21). This was error.

The interrelated issues of whether there was "independent evidence" and whether the immunized testimony was used by the grand jury and/or the

prosecutor directly or derivatively are issues pre-eminently to be resolved at a hearing. As the court said in the McDaniel's case, supra, 449 F.2d at 836-837:

> "The Government contends that it has not violated this [prohibition on derivative use] aspect of the Murphy [v. Waterfront Commission, supra] rule, relying on the blanket assertion that all its evidence was obtained from an independent source*. The Murphy case makes clear, however, that this issue is a question of fact which requires an evidentiary hearing and that the government has the burden of proof:
>
> > 'Once a defendant demonstrates that he has testified, under a... grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence' ..." (First emphasis addes; second emphasis in original).

See, also, Kastigar v. United States, 406 U.S. 441, 457 n. 43 (1972); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 345 (1963); In re Liddy, 506 F.2d 1293, 1303 n. 49 (D.C. Cir. 1974); United States v. Tramunti, 500 F.2d 1334, 1345 (2d Cir. 1974); United States v. Dornau, 359 F.Supp. 684, 685 (S. D.N.Y. 1973), rev'd. on other grds., 491 F.2d 473 (2d Cir. 1974).

It is only at a hearing that it could be ascertained whether any one or

*Coincidentally, when asked by the trial judge what, if any, evidence before the grand jury was independent of appellant's immunized testimony, the prosecutor made the blanket assertion "It would be all" (T. 272).

more members of the prosecutor's office read or was aware of appellant's grand jury testimony, whether any other law enforcement agent read or was aware of this testimony, whether any grand jury witness read or was aware of this testimony, whether any grand jury witness who testified before appellant was recalled to testify after appellant gave her testimony, whether the government located any witnesses as a result of appellant's testimony, whether the prosecutors prepared later grand jury or trial witnesses based on their knowledge of her testimony (even if this was done subconsciously), etc., etc.

In United States v. Dornau, supra, after a full hearing, the District Court ruled that although all trial witnesses had been discovered and prepared without reference to immunized testimony, the counts of the indictment relating to that testimony still had to be dismissed because of the potential for taint and the inability of the government to sustain the burden imposed on it by Murphy. The Court concluded (at 687):

> "[T]here appears to be no reason why he had to read the transcript except to make sure his case was complete to use the testimony to buttress what he already knew, or to fill in gaps with new information.
>
> * * *
>
> It is difficult for the court to speculate as to the effect that the reading of the minutes might have had on the conduct and thinking processes of the Assistant charged with the prosecution of the case.
>
> It appears to me that once the subject matter was touched upon in the privileged

> testimony, and the prosecutor had read it, he could have used it in a variety of ways in this criminal prosecution. The possibility of such use, and the impossibility of clearly showing that the use did not occur calls for the holding in this case that the defendants were denied the constitutional protection that their silence would have given them."

The reversal of the Dornau decision does not reduce the force of the above argument. The reversal was based on the fact that the statute under which Dornau testified gave only use, and not derivative use, immunity and, therefore, even if the prosecutor had done what the lower court believed, the immunity was not violated, 491 F.2d at 478-480. This Court specifically noted that if derivative immunity, as appellant received here under 18 U.S.C. §6002, had been involved the result might have been different. Id. at 481 n. 15.

The dissenters in Murphy and Kastigar argued that only transactional immunity was co-extensive with the Fifth Amendment because of the inability of defendants to show that their immunized testimony had been directly or indirectly used. To meet this objection the majority explicitly held that the government had to negate the possibility of such tainted use at a hearing. If what the lower court permitted here is allowed to stand then derivative use immunity will not be co-extensive with the privilege against self-incrimination and transactional immunity will have to be given to protect a grand jury witnesses' Fifth Amendment rights. Cf. United States v. Hockenberry, 474 F.2d 247, 280 (3d Cir. 1973).

(c) Permitting the prosecutor to cross-examine appellant.

Trial counsel moved to prevent Assistant United States Attorney DePetris from cross-examining appellant because he had read her grand jury testimony and had knowledge of the matters testified to therein. The motion was denied. Counsel then moved that the prosecution not be allowed to "utilize" any of appellant's testimony, and the court reserved decision (T. 4744-50). The following day the court granted the latter motion, citing United States v. Tramunti, supra, and United States v. Hockenberry, 474 F. 2d 247 (3d Cir. 1973). (See copy of decision in appendix).

It is submitted that the denial of the first motion was reversible error and was, in fact, wholly inconsistent with the granting of the second motion.

The immunity granted appellant under 18 U.S.C. §6002 prohibits use and derivative use of her grand jury testimony. In Hockenberry, supra, it was ruled that in order for the prohibition or derivative use to be "co-extensive with the [Fifth Amendment] privilege", immunized testimony could not be used to impeach a defendant. This result was also necessitated by the Supreme Court's holding that: "Immunity from the use of compelled testimony... prohibits the prosecutorial authorities from using the compelled testimony in any respect..." Kastigar v. United States, supra, 406 U.S. at 453 (emphasis in original).

The lower court recognized the applicability of the above to the direct use of appellant's immunized testimony by ruling the prosecution could not "use the grand jury testimony as either affirmative or impeaching testimony". The

court seems, however, to have overlooked the indirect use of this testimony, although that too is barred by Kastigar and Hockenberry.

Trial counsel contended that the prosecutor, who had read appellant's immunized testimony, had used his knowledge of the contents thereof to prepare his cross-examination of appellant. The prosecutor argued that under Harris v. New York, 401 U.S. 222 (1971) such derivative use for impeachment purposes were permissible. The court agreed (T. 4744-49).

What the lower court failed to appreciate was that the Harris argument had been explicitly raised and rejected in Hockenberry, 474 F.2d at 250.

In sum, the same reasons that prohibit the direct use of immunized testimony on cross-examination prohibit its indirect use and permitting the prosecutor to cross-examine appellant requires a new trial.

(d) The refusal of the trial judge to permit defense counsel to develop the issue of bad faith selective prosecution was reversible error.

It was appellant's contention that she was indicted in retaliation for not telling government agents where Frank Matthews was after he jumped bail*. Despite the fact that there were facts to back up this contention, such as the fact that appellant was interviewed immediately after Matthews jumped bail

*She maintained that she was unable to tell them because she thought Matthews was dead (T. 4067) but the government agent believed she knew and was concealing this information (T. 4866, 4908).

(T. 4015-15), that she was not named in the prior indictment (73 Cr. 100), that government agents repeatedly tried to get her to tell them where Matthews was (T. 3492, 4866, 4908), etc., the trial court restricted trial counsel's attempts to put this issue before the jury, demeaned it, and refused to charge the jury on this issue (see, e.g., T. 5179-80). The following exchange is typical:

> "MR. GALLINA: At this time I move for the withdrawal of a...juror. That since the beginning of the trial the defendant Hinton has tried to develop a theory of defense which was very appropriate under the fact pattern as our investigation disclosed it, that the Government was prosecuting Barbara Hinton as a tool to find Mr. Mathews and that the prosecution was not in good faith, and that the evidence was distorted and concocted against the defendant Hinton in order to accomplish this mission and purpose of the Government.
>
> Continuously during the trial, your Honor has either indicated to the jury directly or tangently that the Government is not on trial, that attacks against the Government are not warranted and the only person on trial is Barbara Hinton and the only thing the jury is to consider is evidence against her.
>
> That is not correct and the defendant has been hampered and it's evident at this point that the defendant cannot have due process.
>
> THE COURT: The motion is denied."
> (T. 5025-26)

This Court has ruled that upon a proper showing of bad faith prosecution an indictment must be dismissed. United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974). Accordingly, since appellant had made a prima facie showing of

bad faith, the refusal of the trial court to put this issue before the jury was reversible error.

e) The refusal of the trial court to hold a hearing on the issues of search and seizure and photographic identification was reversible error.

Trial counsel claimed that certain testimony of Roger Garay was inadmissible because based on a trespass upon appellant's land (T. 3364-69, 3389-93). The trial court refused to hold a hearing and this was reversible error.

Trial counsel claimed that in-court identifications of appellant were tainted by (a) the use of photographs obtained by Drug Enforcement Agency agents while appellant's home was sealed pursuant to an Internal Revenue Service levy and (b) the use of other photographs shown witnesses (in particular Donald James) under impermissibly suggestive circumstances. Although proof was offered as to the bad faith of the DEA in obtaining these photos (the levy being against Matthews, not appellant) the trial court refused to hold a hearing. Although the trial court said it would assume that impermissible photographic procedures were used it also refused to hold a hearing*. Both of these refusals were reversible error. United States v. Burse, _____F.2d_____, slip op. 2507, 2514-15 (2d Cir., 3/8/76); Braithwaite v. Manson, _____F.2d_____,

*"The Court: I don't reach the question as to whether the procedures used were improper or highly suggestive. I will assume they were." (T. 1123).

slip op. 595 (2d Cir., 11/20/75); United States v. Tane, 329 F.2d 848 (2d Cir. 1964).

POINT III

THERE WAS INSUFFICIENT NON-HEARSAY EVIDENCE TO ESTABLISH APPELLANT'S KNOWING PARTICIPATION IN THE CONSPIRACY.

As this Court stated in United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969):

> "[T]he judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances."*

It is respectfully submitted that the non-hearsay evidence in the case fell woefully short of that standard.

In United States v. Fantuzzi, 463 F.2d 683, 690 (2d Cir. 1972), quoting from United States v. Ragland, 375 F.2d 471, 477 (2d Cir. 1967), this Court reiterated that mere "association with an alleged conspirator, without more, is insufficient to establish the necessary foundation for the admissibility of the

*The trial court charged throughout the trial that the burden on the government was proof of participation beyond a reasonable doubt via non-hearsay evidence (See, e.g., T. 159). It is respectfully suggested that this Court should adopt this rule. See, e.g., Carbo v. United States, 314 F.2d 718, 735 n.20 (9th Cir. 1963), cited with approval in United States v. Nuccio, 373 F.2d 168, 173 n.3 (2d. Cir. 1967). The "fair preponderance" test has no place in the criminal law. Cf United States v. Taylor, 464 F.2d 240, 242-44 (2d Cir. 1972).

For an incisive criticism of the "fair preponderance" standard see 4 Weinsteins' Evidence ¶801(d)(2)(E)[01] at ftnt. 30.

In any event, we contend that the non-hearsay proof does not even satisfy the more lenient Geaney test.

incriminating statements...". Association is even less probative where, as here, it is naturally explained by the fact that appellant was Frank Matthews common-law wife, the mother of his children, and the individual who was naturally in his company on numerous occasions.*

In the more than 8,000 pages of transcript in this 10 week trial, there are only two pieces of non-hearsay evidence which might be said to indicate appellant's participation in a conspiracy.**

First is the testimony of "Babe" Cameron that appellant received a bag of money from Matthews and was told to "check it". There was no proper showing that appellant knew that there was money in the bag or that she ever did check it.*** In any event, since appellant knew that Matthews was a large scale gambler and since others had dropped off gambling debts and pay-offs before, she could reasonably have assumed this was another gambling debt. If she took the money believing it to be the proceeds of a

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*This fact eliminates the incriminating character the prosecution attempted to import from such events as that appellant being seen leaving her apartment building with her husband and "others".

**The tapes may not be used by the government to help support its Geaney burden because what appellant says on them is totally unintelligible without what was said by the other parties, and this latter is hearsay and inadmissible on the Geaney issue. In any event, most of the taped conversations were shown to be totally innocent.

***Since defense counsel did not cross-examine Cameron on this event, it was improper for the prosecutor, on re-direct, to elicit the testimony that appellant returned and said "O.K.". Cf United States v. Keilly, 445 F.2d 1285, 1288-89 (2d Cir. 1971).

gambling conspiracy, this would not make her a knowing participant in a drug conspiracy. United States v. Purin, 486 F.2d 1363, 1369 (2d Cir. 1973); United States v. Gallishaw, 428 F.2d 760, 762-64 (2d Cir. 1970). In this connection it must be remembered that Cameron (and every other witness) said that drugs were never discussed by or in front of appellant.

Donald James' testimony was similar to that of Cameron. He testified that on three occasions when he brought money to Matthews' apartment appellant was there, and on one occasion he delivered a bag directly to appellant. Once again, however, the witness testified that the money was counted out of appellant's presence, that the source of the money was not mentioned, and that "For all she knew...the money could have been for a gambling debt" (T. 1262).*

Appellant's presence with Frank Matthews and his "associates" is explained by her relationship with Matthews and the totally submissive role that she played. The two incidents of direct deliveries of money to her are explained by her belief that they were gambling debts. There was a complete absence of any testimony directly establishing that appellant knew of and participated in a narcotics conspiracy and the lower court should have so ruled and granted an acquittal. United States v. Fantuzzi, supra.

*There was also a serious question whether the delivery to appellant actually took place. All the surveilling officers said they had never seen James enter the building at 130 Clarkson Avenue and James himself admitted that this "delivery" was not entered in his meticulously kept records.

POINT IV

THERE WAS INSUFFICIENT PROOF TO ESTABLISH APPELLANT'S GUILT BEYOND A REASONABLE DOUBT.

In United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972) this Court adopted the following test to be applied to motions for directed verdicts of acquittal:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

Appellant contends that such a reasonable doubt existed and that the case should never have been submitted to the jury.

Norman Lee Coleman testified to two hearsay statements implicating appellant.*

*Appellant contends that none of the hearsay contained sufficient indicia of reliability and it was inadmissible under United States v. Puco, 476 F.2d 1099 (2d Cir. 1973).

The first was allegedly made by one Purcell Wylie in 1971 and was to the effect that Matthews told Wylie that if he (Matthews)was ever unavailable Wylie should call appellant and she would put Wylie in touch with one of Matthews' lieutenants. Every other witness testified that Matthews never mentioned appellant as being aware of or involved in his drug dealings and those to whom he did give numbers said they were numbers of places appellant was not at (e.g., 333 Henry Hudson Parkway, Atlanta, etc.). In any event, Wylie never testified that he called the number or ever spoke with appellant.

Coleman also testified that John Wesley Carter said that appellant was "shrewd" and could probably run the operation. It was Coleman's later testimony that this was not information given to further the conspiracy but merely "small talk" (T. 336-37). Accordingly, it should have been stricken as inadmissible narrative hearsay. Krulewitch v. United States, 336 U.S. 440, 443-444 (1949); 4 Weinstein's Evidence ¶801(d)(2)(E)[01] at pp. 145-148.

George Ramos testified that when he went to the Clarkson Avenue apartment with Matthews in June 1972, Matthews called "Barbara, Barbara" as he entered the door. Since cocaine was found in the open on a kitchen table this testimony was supposed to permit the jury to infer that Matthews thought appellant might be present where the drugs were. Once again, however, every other witness testified that they never saw appellant in the presence of drugs. Furthermore, appellant did not return to this apartment, from which she had

moved in April 1972, until October 1972 and she testified Matthews would have had no reason to believe that she would be there in June.* Lastly, it must be remembered that there was no testimony when or how the drugs got there, that appellant was not present, and that "Barbara" may have been one of the numerous female mill-workers mentioned throughout the testimony.

The tapes add little to the above testimony. With one exception they were found to be wholly innocent conversations, unrelated to narcotics.** The "tomato crew" conversation with John Darby, which also formed the basis of Count 9, could only have been found to be a narcotics-related conversation based on the testimony of Roger Garay. Garay's status as an individual whom the jury could rely on in matters of the interpretation of words as drug terms of art had been severely shaken because of his misinterpretation of several other conversations. "Shares" had been shown to be stock, not drugs; "things" had been shown to be legal fees and clothes, not drugs; "guarded conversations" had turned out to be wholly innocent and not about drugs. Even Garay admitted that he had never heard the term "tomato" used in drug dealing but said it "could be". In any event, the tape itself demonstrates clearly that appellant

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*In this regard it is interesting to note that Ramos was forced to admit on cross-examination that he never mentioned this incident to any agent during his "extensiv debriefing.

**Although the conversations with Thelma Darby related to John Darby's arrest on drug charges, they contain not a single word indicating appellant's involvement in any drug dealings. In any event, the acquittal of appellant on the telephone count based on these conversations shows that the jury did not believe they were evidence of any criminal conduct.

did not know what the term meant and had to ask Matthews what to say. *

While it is for the jury to determine credibility and draw inferences, they "may not be permitted to conjecture merely or to conclude upon pure speculation". Curley v. United States, 160 F.2d 229, 232 (D.C. Cir. 1947), cited with approval in United States v. Taylor, supra. To permit this conviction to stand on this flimsy evidence would be justified only if a jury could convict on "conjecture...or...pure speculation".**

The most telling argument in favor of the existence of a reasonable doubt is that after thousands of hours of visual surveillance, telephone tapping, debriefing of witnesses and preparation for trial there was not a single shred of hard evidence that appellant knew of and/or participated in Matthews' drug conspiracy. In her totally submissive position she may have done things that another woman in a different milieu would not. But, to paraphrase Judge Friendly in United States v. Freeman, 498 F.2d 569, 576 (2d Cir. 1974):

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*In this context the failure of the trial court to properly charge the jury on the knowledge aspect of the indictment is highly relevant (See Point V). Had the charge been properly given appellant would never have been found guilty.

**This is particularly true of the telephone count conviction where the only evidence that it was in furtherance of the conspiracy was Garay's testimony that "tomato...could be" a drug term of art.

The telephone count conviction must also be reversed because of the refusal of the trial court to sever appellant or John Darby so that the latter could be called at a separate trial and confronted with this conversation. United States v. Sperling, 506 F.2d 1323, 1328 n.2, 1330 n.9 (2d Cir. 1974); United States v. Echeles, 352 F.2d 892 (7th Cir. 1965).

"The mores of the world where Barbara Hinton lived are not those of judges and clergymen, and the inference that her criminal activity was in furtherance of an assumed gambling ring, and nothing more, is far more compelling than the inference that her criminal activity was in furtherance of a known narcotics conspiracy."

The conviction should be reversed and the indictment dismissed. United States v. Freeman, supra; United States v. Purin, supra; United States v. Gallishaw, supra.

POINT V

THE TRIAL COURT'S CHARGE ON "CONSCIOUS AVOIDANCE" WAS DEFECTIVE AND CONSTITUTES REVERSIBLE ERROR.

In defining the issue of knowledge of the existence and purpose of the drug conspiracy, the trial court gave the following charge:

"Now, in determining whether the participation of any of the accused was knowingly done, if the Government proves beyond a reasonable doubt that an accused consciously avoided learning the nature of the act performed by him or her and consciously avoided the sources of information from which he or she would learn that it was unlawful to perform the act, then the Government has proved criminal intent.

In other words, if you find the Government proved beyond a reasonable doubt that an accused did something, and in doing that knew that all he or she had to do was ask, but did not ask because he or she knew what the answer would be and that the answer would indicate that he or she was performing a criminal act, then the Government has proved criminal intent.

I will go into that a little later by examples." (T. 7194-95)

* * *

"Now, coming back to examples of proof of criminal intent through circumstantial evidence, or taking the other principle that the accused consciously avoided knowing that what he or she was doing was criminal in nature, when the source of information was readily available and all he or she needed to do was to make just a routine inquiry, first, as an example, there is testimony that the defendant Barbara Hinton picked up William Fred "Babe" Cameron at a location in Brooklyn and brought him back to 130 Clarkson Avenue. That is my recollection of the evidence and I may be wrong. Let's assume that it so. I recall she testified she picked him up. Mr. Cameron testified that he came to Brooklyn to see Frank Matthews for the purpose of negotiating a narcotics deal.

Now, you determine whether transporting Mr. Cameron to the house for the purpose of negotiating a narcotics deal is an activity that promotes the business of the conspiracy and determine whether such participation is sufficient to bring the defendant Hinton into the conspiracy.

Now, that's only the proscribed conduct. It is like the fellow who just picked someone up.

The next important question which is sharply in dispute is whether Barbara Hinton was aware that Cameron came to Brooklyn to see Mathews in order to negotiate a narcotics deal.

You decide from all the evidence introduced in the trial against the defendant Hinton whether she knew Cameron came to Brooklyn to transact a narcotics deal, and whether knowing that, that she voluntarily and intentionally brought him to Matthews for the purpose of negotiating a deal.

Now, the same may be said of evidence when, and there was some proof, and I think Barbara Hinton admitted it, my recollection is on the stand that she did take some money and just put it away.

You determine from all the circumstances whether those activities were knowing and willful or whether it was innocent and again I say that the Government must prove beyond a reasonable doubt that it was knowing and willful." (T. 7199-7201).

Defense counsel objected to this charge because it did not also state that if appellant believed the acts she performed were for another purpose she would have to be acquitted (T. 7216-19).

The trial court recharged the jury as follows:

"I Can't recall exactly what I said about the inference that may be drawn from circumstantial evidence to determine criminal intent, and I want to make certain that you do not understand that Barbara Hinton testified that she ever counted any money except the one occasion when she picked up some $12,000 from Gattis Hinton -- she testified that she gave $10,000 the lawyer, you remember that. There is testimony in the record that on occasion when Frank Matthews was not home that the defendant Barbara Hinton did receive money, I think on one or two occasions, she testified to that.

She testified she didn't know the purpose of it; she didn't know what it was for; no one told her what it was for, but she took it because Frank Matthews was not home.

There is other testimony in the case that on one occasion, I think, that Frank Matthews gave Barbara Hinton some money, I think it was in a shoppi[illegible]ag, and said, 'Count it.' And I think that the testimo[illegible] is that she came back and said, 'Okay.'

I don't say that the testimony is true, and I don't say that you should believe it. But the first thing you decide is what the facts are, you see. I am just asking you to make a determination from the facts that you heard, the circumstances, and then I charge

> you that the Government must prove beyond a reasonable doubt that whatever acts you find were committed by Barbara Hinton were committed knowingly, in other words, she was aware that this was part of the narcotics business.
>
> If the Government has not proved criminal intent, then you find the defendant Barbara Hinton not guilty because you shall have found, in that event, that she did not commit a crime, she just performed the acts." (T. 7255-56).

Neither the original charge nor the recharge correctly stated the law on the critical issue of knowledge. Accordingly, there must be a new trial.

In United States v. Bright, 517 F.2d 584 (2d Cir. 1975) this Court cited with approval the "balanced" conscious avoidance charges given in United States v. Jacobs, 475 F.2d 270 (2d Cir. 1973) and United States v. Brawer, 482 F.2d 117 (2d Cir. 1973). In both of these cases the court juxtaposed conscious avoidance with a statement that if the defendant actually believed the contrary of guilty knowledge there had to be an acquittal. In Bright, on the other hand, the failure of the trial court to include this negative counterpart led to a reversal. The same result must obtain here.

The trial court was asked for, and refused to give, a charge that conscious avoidance of the purpose of certain acts could not constitute proof of guilty knowledge if the defendant actually was unaware of the purpose of the acts or thought that they were for some other purpose (e.g., gambling as

opposed to drugs).* In other words, the court was asked to charge that the "high probability" of guilty knowledge that flows from conscious avoidance of learning the purpose of certain acts is negated by an actual belief in some other purpose. United States v. Bright, supra, 517 F.2d at 487. The refusal of the court to so charge, particularly in view of several jury questions indicating confusion on the issues of intent and knowledge (T. 7262, 7265), constitutes reversible error.

POINT VI

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 28(i) APPELLANT HEREBY INCORPORATES BY REFERENCE ANY AND ALL ISSUES AND ARGUMENTS RAISED BY HER CO-APPELLANTS INSOFAR AS THEY ARE APPLICABLE TO HER.

Appellant Barbara Hinton incorporates by reference all of the issues raised by her co-appellants included, but not limited to:

(1) The removal of juror No. 6;

(2) Refusal to suppress the tape recordings of telephone conversations;

(3) Multiple conspiracies and prejudice;

(4) Improper introduction of evidence of other crimes;

(5) Refusal to grant severance;

*Merely telling the jury that appellant had testified that "she didn't know the purpose" for certain acts (T. 7255) was wholly insufficient. Firstly, it did not tell the jury that she had stated she believed the purpose was the payment of gambling debts. Secondly, it did not tell the jury that if it believed her testimony as to her belief of the purpose that it had to acquit.

(6) Prosecutorial misconduct;

(7) Errors in the charge of the court.

CONCLUSION

FOR THE ABOVE-STATED REASONS THE JUDGMENT OF CONVICTION MUST BE REVERSED AND THE INDICTMENT DISMISSED; IN THE ALTERNATIVE, THERE MUST BE A REMAND FOR A NEW TRIAL OR A HEARING.

RESPECTFULLY SUBMITTED,

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